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Protective Sweep Incident To A Lawful Arrest: An Analysis of Its Validity Under The Federal and New York State Constitution

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PROTECTIVE SWEEP INCIDENT TO A LAWFUL ARREST: AN ANALYSIS OF ITS VALIDITY UNDER THE FEDERAL AND NEW YORK STATE CONSTITUTIONS

INTRODUCTION

As the United States Supreme Court provides decreased protection for individuals' rights, individuals are increasingly looking to their respective state constitutions to provide protection of their individual rights.[1] The guiding principle behind this movement is that the United States Constitution establishes minimum standards, upon which the states are free to expand.[2] In the areas of criminal law and procedure, where infringement of individual rights can potentially lead to drastic results, state

1. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977); *see generally* Ronald K. L. Collins, Peter J. Galie, John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HAST. CONST. L. Q. 599 (1986) (survey of recent litigation in area of individual rights); Note, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982) (discussing developments in state constitutional rights areas) [hereinafter *Developments in the Law*].

2. *See, e.g.*, People v. Isaacson, 44 N.Y.2d 511, 519, 378 N.E.2d 78, 82, 406 N.Y.S.2d 714, 718, (1978) ("Under our own State due process clause (N.Y. State Const. art. I, § 6) this court may impose higher standards than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provision . . . ."); *see also* Brennan, *supra* note 1, at 491 ("[S]tate courts cannot rest when they have afforded their citizens the full protection of the federal constitution. State constitutions, too, are a font of individual liberties, their protection often extending beyond those required by the Supreme Court's interpretation of federal law."); Collins, *supra* note 1, at 599 ("A growing number of state high courts have been construing their own constitutions in a way recognizing 'greater' protection for individual rights that has been recognized by the United States Supreme Court in interpreting the federal Constitution."); *Developments in the Law*, *supra* note 1, at 1368 n.3 ("[T]he requirements established by the Supreme Court set an effective lower bound on state constitutional interpretation . . . .").

constitutional protections are particularly important.[3]

This Comment addresses the issue of whether or not a "protective sweep" incident to lawful arrest is constitutional under both federal and New York law. It examines the "protective sweep" doctrine, pursuant to which police officers may have a right to conduct a limited search of a premises, without a warrant, in order to assure their safety after a lawful arrest.[4] Part One of this Comment provides a legal backdrop to this issue. Part Two examines this issue under federal law. Part Three addresses this issue under New York law. Because there seems to be a relative dearth of case law from the New York Court of Appeals regarding the constitutionality of protective sweeps incident to a lawful arrest,[5] this Comment focuses on general decisions from the New York Court of Appeals which have dealt with the broader subject of searches incident to a lawful arrest under the New York State Constitution.[6] It also discusses several New York Supreme Court, Appellate Division[7] decisions that directly considered the issue of protective sweeps, and in addition it probes other jurisdictions to see how the highest court in those states dealt with the issue. This analysis may give some insight as to how the New York Court of Appeals might rule on a protective sweep case if it was to hear one.

Finally, this Comment concludes that "protective sweeps" are

3. *See* Collins, *supra* note 1, at 613-14 (data in survey shows that state constitutional claims are more likely to be raised in criminal justice cases than in non-criminal rights cases); *Developments in the Law*, *supra* note 1, at 1370-84 (discussion of criminal procedure under state constitutions).

4. *See infra* notes 24-226 and accompanying text (discussing protective sweep doctrine and scope).

5. *See* People v. Febus, 157 A.D.2d 380, 382, 556 N.Y.S.2d 1000, 1001 (1st Dep't), *appeal granted,* 76 N.Y.2d 898, 562 N.E.2d 885, 561 N.Y.S.2d 560 (1990), *appeal denied,* 77 N.Y.2d 835, 568 N.E.2d 652, 567 N.Y.S.2d 203 (1991) (discussing "dearth" of cases on point on the issue of protective sweeps on the federal level). It should be noted that the New York Court of Appeals had an opportunity to address the issue, but chose not to.

6. *See infra* notes 114-77; *see also infra* note 16 (citing N.Y. CONST. art. I, § 12).

7. Although the appellate division departments are at a lower level than that of the court of appeals, a comprehensive analysis of the protective sweep issue must not ignore lower court decisions that are close to or on point.

constitutional under federal law with certain limitations, and that the New York Court of Appeals is not likely to expand the privacy rights of its citizens under the New York State Constitution and will hold that "protective sweeps" are constitutional under New York law as well.

I. LEGAL BACKDROP

Through the due process clause of the Fourteenth Amendment,[8] the United States Supreme Court has incorporated to the states[9] those portions of the Bill of Rights which it views as "fundamental to the American scheme of justice . . . ."[10]

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8. U.S. CONST. amend. XIV § 1 ("[n]o State . . . shall deprive any person of life, liberty, or property, without due process of law . . .")

9. *See* Duncan v. Louisiana, 391 U.S. 145, 147-49 (1968). *Duncan* is the case most often cited as the basis for the "incorporation doctrine." *See id.* In *Duncan*, the Supreme Court discussed those rights arising under the Federal Constitution that it had previously held applicable to the states through the fourteenth amendment. *Id.*; *see infra* note 10. The Court further recognized that the sixth amendment "right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction." *Duncan*, 391 U.S. at 154.

10. *See Duncan*, 391 U.S. at 149. The test of whether the right guaranteed by the Federal Constitution with respect to federal proceedings is also protected against state action by the fourteenth amendment has been phrased in a number of ways including: "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)); rights "'basic in our system of jurisprudence,'" *Id.* (quoting *In re* Oliver, 333 U.S. 257, 273 (1948)); and "'fundamental right, essential to a fair trial.'" *Id.* (quoting Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963)).

Those rights which have been held binding on the states under the due process provisions of the fourteenth amendment are as follows: the right to compensation for property taken by the state, Chicago, B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 228-30 (1897); the rights of speech, press, and religion covered by the first amendment, *see, e.g.*, Fiske v. Kansas, 274 U.S. 380, 387 (1927); the fourth amendment rights to be free from unreasonable searches and seizures, Duncan v. Louisiana, 391 U.S. 145, 148 (1968); the exclusionary rule requiring that the result of a violation of this prohibition not be used as evidence against the defendant, Mapp v. Ohio, 367 U.S. 643, 657 (1961); the fifth amendment right to be free of compelled self-incrimination,

Pursuant to the "incorporation doctrine,"[11] there exist certain basic constitutional restraints on criminal procedure.[12] The Fourth Amendment,[13] which prohibits unreasonable searches and seizures,[14] is one such provision that has been incorporated to the states in this manner.[15] The New York State Constitution provides protection similar to those provided by the Fourth Amendment.[16]

Malloy v. Hogan, 378 U.S. 1, 3 (1964); prohibition against double jeopardy, Benton v. Maryland, 395 U.S. 784, 785 (1969); the sixth amendment rights to counsel, Gideon v. Wainwright, 372 U.S. 335, 339 (1963); to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213, 214 (1967); public trial, *In re* Oliver, 333 U.S. 257, 278 (1948); to confrontation of opposing witnesses, Pointer v. Texas, 380 U.S. 400, 407-08 (1965); to compulsory process for obtaining witnesses, Washington v. Texas, 388 U.S. 14, 15 (1967); trial by jury, Duncan v. Louisiana, 391 U.S. 145, 161-62 (1968); and the eighth amendment prohibition against cruel and unusual punishment, Robinson v. California, 371 U.S 905, 905 (1962).

11. *See supra* notes 8-10 and accompanying text.

12. *See, e.g.*, U.S. CONST. amend. IV (prohibition against unreasonable searches and seizures and the exclusion from trials of any evidence illegally seized); U.S. CONST. amend. V (privilege against compelled self-incrimination and double jeopardy); U.S. CONST. amend. VI (right to counsel, to speedy and public trial, to confrontation of opposing witnesses, to compulsory process for obtaining witnesses, and to jury trial); U.S. CONST. amend. VIII (prohibition against cruel and unusual punishment); *see also infra* notes 8-10 and accompanying text (discussing incorporation of these amendments to the states).

13. U.S. CONST. amend. IV. This provision states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmance, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

14. *Id.*

15. Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("[E]vidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court . . . .").

16. N.Y. CONST. art. I, § 12. This section states, in part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place

Pursuant to what has come to be known as the "exclusionary rule,"[17] evidence obtained during an unconstitutional search is inadmissible in a subsequent criminal proceeding against the defendant.[18] In addition, not only is illegally obtained evidence ex-

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to be searched, and the persons or things to be seized.

Id.

17. *See* Mapp v. Ohio, 367 U.S. 643, 657 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914). The first case to address the use of evidence obtained during an unconstitutional search was Weeks v. United States, 232 U.S. at 398. In *Weeks*, the Court concluded that to admit evidence illegally seized by federal officers would, in effect, put a stamp of approval on their unconstitutional conduct. *Id.* at 394. The Court stated that "[t]o sanction [unlawful invasion of the sanctity of the home by officers of the law] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.*

In *Mapp*, the Court further held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court." *Id.* at 655. The Court reasoned that:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

Id.

18. *See supra* note 17. The primary purposes of the exclusionary rule are the deterrence of unreasonable searches and seizures, "the imperative of judicial integrity" -- that the courts not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold," and "of assuring the people -- all potential victims of unlawful government conduct that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.1, at 80 (1985) (citing Terry v. Ohio, 392 U.S. 1 (1968); Linkletter v. Walder, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Wolf v. Colorado, 338 U.S. 25 (1949)).

cluded, but all evidence obtained or derived from exploitation of that evidence must also be excluded.[19]

The general rule is that for a legal search and seizure to exist, a police officer must have a validly executed search warrant.[20] However, one exception to this general rule[21] is that a search incident to a lawful arrest is permitted.[22] A remaining question concerns the permissible scope of this search.[23]

II. CONSTITUTIONALITY OF PROTECTIVE SWEEPS UNDER FEDERAL LAW

A. Protective Sweep Defined

A "protective sweep" is defined as "a quick and limited search

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19. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (test of excludability is not whether evidence would not have come to light but for the illegal actions of the police, but whether evidence was come to by exploitation of illegality rather than by a means sufficiently distinguishable to be purged of primary taint); Nardone v. United States, 308 U.S. 338, 340-41 (1939) ("[The] essence of a [statutory] provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before court, [in a criminal case,] but that it shall not be used at all.").

20. *See supra* note 13 (citing U.S. CONST. amend. IV, which is the constitutional basis for this requirement); *see also* W. LAFAVE & J. ISRAEL, *supra* note 18, § 3.4, at 126-40 (discussing necessity and requirements for validly executed search warrants).

21. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, (1978). All warrantless searches are unconstitutional unless they fit into one of six recognized exceptions to warrant requirement. *Id.* at 313-14. These six exceptions are: search incident to a lawful arrest; the "Automobile" exception; the "Plain View" doctrine; search in response to exigent circumstances; search by consent; and stop and frisk searches. W. LAFAVE & J. ISRAEL, *supra* note 18, §§ 3.5-4.5, at 141-200.

22. *See* United States v. Robinson, 414 U.S. 218, 224-26 (1973) (police may conduct search incident to arrest whenever full custodial arrest is authorized for offense; they need not actually fear for their safety or believe that they will find evidence of crime); Gustafson v. Florida, 414 U.S. 260, 263-64 (1973) (companion case to *Robinson*).

23. *See infra* notes 27-226 and accompanying text (discussing constitutional scope of search incident to lawful arrest).

of premises, incident to an arrest and conducted to protect the safety of police officers or others."[24] "It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding."[25] The sweep is justified in an arrest situation because of the need to ensure an officer's safety by uncovering persons other than the arrestee who may be concealing their presence on the premises, and consequently pose a threat to the arresting officers.[26]

B. The Chimel Era

The narrow issue of whether arresting officers have the right to "protectively sweep" premises in order to protect their safety did not arise until the United States Supreme Court addressed it in *Chimel v. California*.[27] Prior to *Chimel*, officers were authorized to conduct a complete search of the entire premises if the search was incident to a lawful arrest, and the arrest occurred on those premises.[28] The Court in *Chimel* extensively reviewed the conflicting authority regarding the permissible scope of a search incident to a lawful arrest,[29] and narrowed the doctrine

24. Maryland v. Buie, 494 U.S. 325, 327 (1990). *See infra* notes 72-108 and accompanying text.

25. *Buie*, 494 U.S. at 327. The sweep may extend to inspection of those areas that are large enough so that a human being may be found. *Id.* A protective sweep occurs as an adjunct to the serious step of taking a person into custody. *Id.* at 333.

26. *See* Paul R. Joseph, *The Protective Sweep Doctrine: Protecting Arresting Officers From Attack By Persons Other Than The Arrestee*, 33 CATH. U. L. REV. 95, 97 (1983). A study of 110 police shootings reported that 19% of the shootings were attributed to "'[f]ailure to search the suspects or rooms properly.'" *Id.* at n.12 (quoting Bristow, *Police Officer Shootings — A Tactical Evaluation*, 54 J. CRIM. L. & CRIMINOLOGY 93, 94 (1963)).

27. 395 U.S. 752 (1969).

28. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950) (search of defendant's business incident to lawful arrest was legal because it fell within principle giving law enforcement authorities right to search place where arrest was made in order to find and seize things connected with crime), *overruled by* Chimel v. California, 395 U.S. 752 (1969); *see also* United States v. Harris, 435 F.2d 74 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971).

29. *See Chimel*, 395 U.S. 752, 755-62 (1969). Approval of a warrantless search incident to a lawful arrest was first addressed by the Supreme Court in

1914 as dictum in Weeks v. United States, 232 U.S. 383 (1914). In *Weeks*, the Court recognized the right under American law "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Id.* at 392. Eleven years later, in Carroll v. United States, 267 U.S. 132 (1925), the Court expanded upon *Weeks* by holding that "[w]hen a [person] is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." *Id.* at 158. In neither of these two cases did the Court indicate that the place where one is arrested may be searched. *See Weeks*, 232 U.S. at 398; *Carroll*, 267 U.S. at 155-56.

In Agnello v. United States, 269 U.S. 20 (1925), however, the Court expanded on its previous holdings. *Id.* at 30-31. The Court stated that "the right without a search warrant contemporaneously to search persons lawfully arrested while committing [a] crime and to search the place where the arrest is made in order to find and seize things connected with the crime . . . is not to be doubted." *Id.* at 30.

In Marron v. United States, 275 U.S. 192 (1927), the Court held that agents who had searched items and areas not covered by a search warrant "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise." *Id.* at 199.

In Harris v. United States, 331 U.S. 145 (1947), the Court upheld an officer's search through an entire apartment in an attempt to uncover two canceled checks. *Id.* at 149. The Court rejected Harris' fourth amendment claim, and sustained the search as "incident to arrest." *Id.* at 151. Here, the officers looked in Harris' desk drawer and went through his sealed papers in order to obtain crucial evidence of his crime. *Id.*

One year after *Harris*, the Supreme Court's pendulum swung. In Trupiano v. United States, 334 U.S. 699 (1948), the Court stated that agents who raided and searched an illicit distillery violated the fourth amendment and rendered the search unlawful by their failure to procure a search warrant, in spite of the fact that they had more than enough time before the raid to obtain a search warrant. *Id.* at 705. The Court stated that "[i]t is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable." *Id.* "This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities." *Id.* A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the same time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. *Id.* at 708.

Two years later the pendulum swung back in United States v. Rabinowitz, 339 U.S. 56 (1950), when the Court held that a search of the defendant's

previously delineated by the Supreme Court.[30]

In the Term before *Chimel* was decided, the Court in *Terry v. Ohio*[31] concluded that in a "stop and frisk" street arrest, an officer did not unreasonably search a suspect when the officer had a "reasonable suspicion" that the suspect was armed and dangerous.[32] The Court explained that the balance between the need to search and the right of the individual to be free from governmental intrusion is the basis of the Fourth Amendment reasonableness standard.[33] Further, the Court explained that "in justifying the . . . intrusion[,] the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[34]

In *Chimel*, police officers, possessing a valid arrest warrant for the perpetrator of a coin shop burglary, arrived at the house of the petitioner and placed him in custody.[35] When the officers requested permission to look around the house, the petitioner objected.[36] Nevertheless, on the basis of the lawful arrest, the officers conducted a search of the petitioner's entire three-bedroom house, including his garage, attic, and a small workshop, even though no search warrant had been issued.[37] The officers then directed the petitioner's wife to move the contents of the drawers in the master bedroom so that they could view any items that may

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business incident to a lawful arrest was legal because it fell within the principle giving law enforcement authorities "the right to 'search the place where the arrest is made in order to find and seize things connected with the crime' . . . ." *Id.* at 61 (quoting *Weeks*, 232 U.S. at 392); *see also supra* note 25 and accompanying text. At the time of the arrest in *Rabinowitz*, the officers searched cabinets, a safe, and a desk for forged stamps, which were eventually found and admitted into evidence. *Rabinowitz*, 339 U.S. at 59. The Court cited *Harris* as "ample authority" for its conclusion. *Id.* at 63.

30. *See Chimel*, 395 U.S. at 772, 780 (White, J., dissenting). *See also infra* notes 35-50 and accompanying text.

31. 392 U.S. 1 (1968).

32. *Id.* at 27.

33. *Id.* at 20-21.

34. *Id.* at 21.

35. *Chimel*, 395 U.S. at 753.

36. *Id.*

37. *Id.* at 754.

have been lifted in the burglary.[38] They seized several items, including coins which later turned out to be those taken in the burglary.[39]

The coins were admitted into evidence over the petitioner's objection that they were unconstitutionally seized.[40] The petitioner was subsequently convicted.[41] His conviction was affirmed by the California Court of Appeals[42] and then by the state's highest court, the California Supreme Court.[43]

The United States Supreme Court held that the search was unconstitutional under the Fourth Amendment and reversed the petitioner's conviction.[44] The Court reasoned that "there [wa]s ample justification . . . for a search of the arrestee's person and the area 'within his immediate control'. . . mean[ing] the area from within which he might gain [or grab] possession of a weapon or destructible evidence."[45] The Court stated, however, that "[t]here is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs," and that such searches must "'adher[e] to [the] judicial processes' mandated by the Fourth Amendment."[46]

Although *Chimel* narrowed the Court's previous interpretation of the scope of a search incident to a lawful arrest,[47] it did not limit these searches unconditionally.[48] The Court in *Chimel* indi-

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. People v. Chimel, 61 Cal. Rptr. 714, 715 (1967), *aff'd,* 439 P.2d 333, 338, (Cal. 1968), *rev'd,* Chimel v. California, 395 U.S. 752 (1969).

43. People v. Chimel, 439 P.2d 333, 338 (Cal. 1968), *rev'd,* 395 U.S. 752 (1969).

44. *Chimel,* 395 U.S. at 763.

45. *Id.* The area which the arrestee might grab or reach for control of a weapon is often referred to as the "grab area." *Id. See* People v. Gokey, 60 N.Y.2d 309, 312, 457 N.E.2d 723, 724, 469 N.Y.S.2d 618, 619 (1983); *infra* note 61 and accompanying text.

46. *Chimel,* 395 U.S. at 763; *see also supra* notes 13, 20 and accompanying text.

47. *See supra* note 29 and accompanying text.

48. Gary Kelder & Alan J. Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding The Propriety of Searches Conducted*

cated that a primary reason for upholding such searches is the strong concern for the safety of arresting officers,[49] suggesting a willingness on the part of the Court to consider a broader right to search as a precautionary measure in circumstances which might pose a threat to police officers.[50] However, the Court in *Chimel* did not positively affirm that a protective sweep is lawful.

C. The Post-Chimel Era

Despite the fact that many courts have subsequently interpreted *Chimel* as banning only "routine" warrantless searches, and not searches that are conducted under exigent circumstances,[51] *Chimel's* basic doctrine has been extended.[52]

In *United States v. Robinson*,[53] the Court concluded that if a search is incident to a lawful arrest, the search is permissible whether or not weapons or evidence reasonably could be expected to be discovered.[54] The Court in *Robinson* reasoned that the risks to officers in any arrest situation are high, and that all arrests should, therefore, be treated alike in measuring the permissible scope of a search incident to those arrests.[55]

Contemporaneously With An Arrest On Or Near Private Premises, 30 SYRACUSE L. REV. 973, 1069-70 (1979).

49. *Id.*

50. *Id.*

51. *See* Kelder & Statman, *supra* note 48, at 1069-70. Exigent circumstances exist where there is an emergency due to the possibility that escape by the arrestee is likely or that evidence may be removed by him or her. *Id.*

52. *See infra* notes 59-108 and accompanying text.

53. 414 U.S. 218 (1973).

54. *Id.* at 224. In *Robinson*, the respondent was arrested for driving without a license, a crime for which no tangible evidence exists. *Id.* at 220. The officer searched the arrestee and found a "crumpled up" cigarette package. *Id.* at 223. The officer opened the package and found heroin inside even though it was implausible that a weapon could be concealed in the package. *Id.* The Court went further in *Robinson* than it did in *Terry*, because in *Terry* the officers were only allowed to search an item that could conceal a weapon. *See* Terry v. Ohio, 392 U.S. 1, 24-27 (1968). In *Robinson*, an item that clearly could not contain a weapon was examined. *Robinson*, 414 U.S. at 221 n.2.

55. *Robinson*, 414 U.S. at 234-35.

In *New York v. Belton*,[56] the Court held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[57] The Court stated that "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within reach."[58]

Belton is in line with *Robinson,* in that it seems to indicate the Court's willingness to extend searches incident to a lawful arrest beyond the "grab area" as defined by *Chimel*.[59] However, in the dissent, Justices Marshall and Brennan indicated that they feared *Belton* was an unwarranted abandonment of the principles underlying *Chimel* and that it might signal a wholesale retreat from the Court's carefully developed search incident to arrest analysis.[60] The dissent further added that:

> By approving the constitutionality of the warrantless search in this case, the Court carves out a dangerous precedent that is not justified by the concerns underlying *Chimel*. Disregarding the principle "that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement," . . . the Court for the first time grants police officers authority to conduct a warrantless "*area*" search under circumstances where there is no chance that the arrestee might gain possession of a weapon or destructible evidence.[61]

In 1983, the foundations for the language used in *Maryland v. Buie*,[62] the most recent case on point[63] were laid down in *Michigan v. Long*.[64] In *Long*, the Court stated that its previous

56. 453 U.S. 454 (1981).

57. *Id.* at 460. *See infra* notes 118-129 and accompanying text.

58. *Belton*, 453 U.S. at 460.

59. *Id.* at 463-64.

60. *Id.* (Marshall, and Brennan, J.J., dissenting).

61. *Id.* at 468 (quoting Cupp v. Murphy, 412 U.S. 291, 295 (1973); Chimel v. California, 395 U.S. 752, 763 (1969)) (emphasis added).

62. 494 U.S. 325 (1990).

63. *See infra* notes 72-108 and accompanying text (discussing *Buie*).

64. 463 U.S. 1032 (1983).

cases indicated that the policy of providing protection for police officers might justify protective searches when the police have a reasonable belief that there is danger present.[65] The Court concluded that:

> [T]he search of a passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible [under the Fourth Amendment] if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.[66]

In *Long*, the police found marihuana in the passenger compartment of petitioner's car.[67] The police searched the compartment because they believed that the vehicle contained weapons potentially dangerous to the officers.[68] The Court held that the police search was reasonable under the principles articulated in *Terry* [69] and other decisions of the Court.[70]

Even after *Long*, there existed a need for a more definite standard with regard to the scope of searches incident to lawful arrests, particularly in the area of protective sweeps.[71]

In 1990, the landmark case of *Maryland v. Buie*,[72] which is the current state of the federal law with respect to protective sweeps,

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65. *Long*, 463 U.S. at 1049.

66. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

67. *Long*, 463 U.S. at 1034-35.

68. *Id.* at 1035. The officers observed Long driving his car at excessive speeds and subsequently the car ended up in a ditch. *Id.* After the suspect refused to produce his driver's license, both officers noticed a knife on the floor of the car and decided to search the car for other weapons. *Id.* at 1036.

69. *Terry*, 392 U.S. at 21. In balancing the need to search against the invasion of the suspect's privacy, the *Terry* court justified similar searches, such as the one in *Terry*, when the police officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, [would] reasonably warrant that intrusion." *Id.*

70. *Long*, 463 U.S. at 1035.

71. Joseph, *supra* note 26, at 143-44.

72. 494 U.S. 325 (1990).

was decided.[73] The Court was required to determine what level of justification is necessitated by the Fourth Amendment[74] before police officers, in the process of an in-house arrest pursuant to an arrest warrant, may conduct a protective sweep of all or part of the premises without a search warrant.[75] The Court concluded that a protective sweep incident to a lawful arrest was permissible if the searching officer "'possesse[d] a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed] the officer in believing' that the area swept harbored an individual posing a danger to the officer or others."[76]

In *Buie*, two men committed an armed robbery of a restaurant and one of them was seen wearing a red running suit.[77] The police obtained arrest warrants for respondent Buie and his ac-

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73. *Id.*

74. *See supra* notes 8-10 and accompanying text (discussing incorporation doctrine).

75. *Buie*, 494 U.S. at 327. It should be noted that such a "protective sweep" is not a full search of the premises, but is limited "to a cursory inspection of those spaces where a person may be found." *Id.* at 335. The sweep shall not last any longer than it takes to complete the arrest or to dispel the reasonable suspicion of danger. *Id.* at 335-36. *See also supra* notes 24-26 and accompanying text (discussing definition of "protective sweep").

The Court of Appeals of Maryland held that evidence seized in plain view during the protective sweep should be suppressed because the officers who conducted the sweep did not have probable cause to believe that a "serious and demonstrable potentiality for danger existed." Buie v. State, 550 A.2d 79, 86 (Md. 1988).

76. *Buie*, 494 U.S. at 327 (quoting Michigan v. Long, 463 U.S. 1032, 1049-50 (1983); Terry v. Ohio, 392 U.S. 1, 21 (1968)). The vote was 7-2, with Justices Brennan and Marshall dissenting. *Id.* at 326.

It appears that due to the fact that Justice Brennan has retired from the Court and has been replaced by the more conservative Justice Souter, the holding in *Buie* is on even more solid ground today. Support for this prediction is evidenced in the recent case of Florida v. Bostick, 111 S. Ct. 2382 (1991). In *Bostick*, the Court held that police officers may conduct warrantless searches or "sweeps" of buses, including all luggage, without even a "reasonable suspicion" as articulated by *Terry*, *Long*, and *Buie*. *See id.* This shows the Court's apparent willingness to dilute the protection given to private citizens by the fourth amendment.

77. *Buie*, 494 U.S. at 328.

complice and subsequently executed the arrest warrant for Buie at his house.[78] Once inside the house, the officers searched through the first and second floors and one officer went to the basement in order to "freeze" it so that no one could come up and surprise the officers.[79] Buie emerged from the basement and was placed in custody.[80] A second officer went down to the basement to see if another suspect was there.[81] While the officer was in the basement he spotted a red running suit, which was admitted into evidence at Buie's subsequent trial.[82]

The Court of Special Appeals of Maryland affirmed the trial court's denial to suppress the evidence of the red running suit.[83] The court reasoned that although a person's home is his "castle," a fact that usually requires police to have probable cause and a warrant to invade this privacy, there is an exception where exigent circumstances exist.[84] The court stated that "if there is reason to believe that the arrestee ha[s] accomplices who are still at large, something less than probable cause -- reasonable suspicion -- should be sufficient to justify a limited additional intrusion to investigate the possibility of their presence."[85]

The Court of Appeals of Maryland reversed this decision,[86] and the United States Supreme Court granted certiorari.[87] The question presented to the United States Supreme Court was what level of justification is required by the Fourth Amendment before police officers can enter premises to search for individuals other than the individual legally arrested.[88]

The United States Supreme Court indicated that on the issue of

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. Buie v. State, 531 A.2d 1290, 1295 (Md. 1987), *rev'd*, 550 A.2d 79, 86-87 (Md. 1988), *vacated*, Maryland v. Buie, 494 U.S. 325 (1990).
84. *Id.* at 1297.
85. *Id.*
86. Buie v. State, 550 A.2d 79, 86-87 (Md. 1988), *vacated*, Maryland v. Buie, 494 U.S. 325 (1990) (reversal was by 4 to 3 vote).
87. Maryland v. Buie, 490 U.S. 1097 (1989).
88. *Buie*, 494 U.S. at 330.

protective sweeps incident to a lawful arrest, there must be a "balanc[ing of] the intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests."[89] The Court explained that there is "no ready test for determining reasonableness [of searches] other than by balancing the need to search . . . against the invasion which the . . . search . . . entails."[90]

The Supreme Court referred to *Terry* as "most instructive"[91] on the issue of protective sweeps, and rationalized its holding in *Buie* by analogizing it to the *Terry* holding.[92] The Court indicated that the *Terry* standard of "reasonable belief, based on specific and articulable facts" in warrantless searches is also applicable to protective sweep situations.[93] While in *Terry*, the Court held that this standard applies to whether the arrestee was armed and dangerous,[94] in *Buie*, the Court held that it applies to whether the area to be swept harbors dangerous individuals.[95]

After taking into account its holdings in *Terry* and *Long*,[96] the *Buie* Court concluded that the officers were entitled to search anywhere in the house in which Buie might be found.[97] The Court added that "once [Buie] was found, . . . the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched."[98] However, the Court qualified this statement by explaining that Buie's expec-

89. *Id.* at 331 (citing United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

90. *Id.* at 332 (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)).

91. *Id.* at 331.

92. *Id.* at 331-32. It appears that the Court found the *Terry* street arrest scenario analogous to the *Buie* house arrest scenario. *See id.* This analogy can also be made to the *Long* case, which uses the same "specific and articulable facts" language to justify an officer's search of an automobile. *Long*, 463 U.S. at 1049-50. In *Long*, however, the officer's belief was related to the suspects ability to gain control of a weapon. *Id.*

93. *Buie*, 494 U.S. at 332.

94. *Terry*, 392 U.S. at 27.

95. *Buie*, 494 U.S. at 327.

96. *Id.* at 332.

97. *Id.* at 332-33.

98. *Id.* at 333.

tation of privacy for the undisturbed rooms of his house does not immunize the rooms from entry by the officers if the officers were taking steps to assure themselves that Buie's house did not harbor any dangerous persons who could "unexpectedly launch an attack" on them.[99] The Court stated that the interest of the officer's safety is sufficient to outweigh the intrusion that such a sweep may entail, and that this is "no more and no less than was required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one."[100]

The Court further rationalized its extension of *Chimel's* "grab area"[101] holding to *Buie's* "sweep of the premises"[102] holding by pointing out that *Chimel* dealt with a "full-blown search of the entire house" and "not the more limited intrusion contemplated by a protective sweep."[103] In addition, the Court indicated that the type of search authorized in *Buie* was far removed from the top-to-bottom search involved in *Chimel,* and it "may be conducted only when justified by a reasonable articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene."[104]

In his concurrence, Justice Stevens agreed with the reasoning of the majority opinion, but articulated certain reservations regarding the protective nature of such searches.[105] He questioned why

99. The Court stated that "an in home arrest put the officer at the disadvantage of being on his adversary's 'turf'. . . [and that] [a]n ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." *Id.*

100. *Id.* at 334. An analogous case is Ybarra v. Illinois, 444 U.S. 85 (1979), where the Court stated that although armed with a warrant to search a bar and bartender, the police could not frisk the bar's patrons absent individualized, reasonable suspicion that the person to be frisked was armed and presently dangerous. *Id.* at 90 n.2, 92-93. The Court further stated that the reasonable suspicion standard strikes the proper balance between officer safety and citizen privacy. *Id.* at 95-96.

101. *Chimel,* 395 U.S. at 763 ("grab area" is area into which arrestee might reach to gain immediate control of dangerous weapon). *See supra* note 45.

102. *See supra* notes 77-82 and accompanying text.

103. *Buie,* 494 U.S. at 336.

104. *Id.*

105. *Id.* at 337 (Stevens, J., concurring).

an officer who was concerned about his safety would risk searching the basement without any *backup* help, and stated that in order for these searches to be reasonable, they must truly be protective in nature.[106]

The dissent criticized the "emerging tendency on the part of the Court to convert the *Terry* decision from a narrow exception into one that swallow[s] the general rule that [searches] are 'reasonable' only if based on probable cause."[107] The dissent concluded that "police officers must have probable cause to fear that their personal safety is threatened by a hidden confederate of an arrestee before they may sweep through the entire home."[108]

As the discussion above manifests, a protective sweep incident to lawful arrest is constitutional under federal law, provided the appropriate standard is followed by the searching police officers. This standard requires that the police officers possess a reasonable belief, based on specific and articulable facts, which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the area swept harbors an individual posing a danger to the officer or others.

III. NEW YORK LAW

A. Court of Appeals Cases

As previously discussed, the United States Supreme Court has repeatedly maintained that the Federal Constitution establishes only a base level of protection for individual rights,[109] and that "a State is free *as a matter of its own law* to impose greater restrictions on police activity."[110] However, as the New York

106. *Id.* at 337-38 (Stevens, J., concurring) (emphasis added).

107. *Id.* at 340 (Brennan, and Marshall, J.J., dissenting) (citing United States v. Place, 462 U.S. 696, 719 (1983)). Justice Marshall added that "the Court's implicit judgment that a protective sweep constitutes a 'minimally intrusive' search akin to that involved in *Terry* markedly undervalues the nature and scope of the privacy interests involved." *Id.* at 341.

108. *Buie*, 494 U.S. at 343 (Brennan, and Marshall, J.J., dissenting).

109. *See supra* note 2 and accompanying text.

110. Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis added). *See,*

Court of Appeals has pointed out, the "mere fact that [a] State Constitution *might* establish greater restrictions on police activity does not compel the conclusion that it does establish such greater restrictions."[111] The New York State Constitution provides similar protection to the Fourth Amendment in the area of searches and seizures.[112] The remaining question is whether the New York Court of Appeals has granted greater protection to individuals in the area of search and seizures incident to lawful arrest than is established by the federal law articulated above.[113]

In *People v. Gonzalez*,[114] the New York Court of Appeals held that a search of the defendant's home was unreasonable due to the fact that his consent was involuntary.[115] The court stated that in the absence of a valid search warrant, governmental intrusion into the privacy of the home was prohibited under the New York State Constitution.[116] The court reasoned that "[e]ven if an individual

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e.g., Barker v. Wingo, 407 U.S. 514, 523 (1972) (standing for same proposition); Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967); *see also supra* note 2 and accompanying text.

111. People v. Belton, 55 N.Y.2d 49, 56-57, 432 N.E.2d 745, 748-49, 447 N.Y.S.2d 873, 876-77 (1982) (Gabrielli, J., concurring) (emphasis added).

112. *See supra* note 16 (citing N.Y. CONST. art. I, § 12).

113. The New York Court of Appeals has recently decided People v. Keta, 165 A.D.2d 172, 567 N.Y.S.2d 738 (2d Dep't 1991), *rev'd*, People v. Scott; People v. Keta, Nos. 6, 27, 1992 WL 62774 (N.Y. Apr. 2, 1992), and People v. Scott, 169 A.D.2d 1023, 565 N.Y.S.2d 576 (3d Dep't 1991), *rev'd*, People v. Scott; People v. Keta, Nos. 6, 27, 1992 WL 62774 (N.Y. Apr. 2, 1992), which gave New York citizens more protection under the New York State Constitution than they would have been provided under the Federal Constitution. Kevin Sack, *New York Court Voids Searches Allowed by U.S.*, N.Y. TIMES, April 3, 1992, at A1, B6. Although these cases dealt with the issue of unreasonable search and seizures, they were not directly on point with the protective sweep issue. These cases did not deal with searches incident to a lawful arrest, nor a security check of the premises. The search of an open field as in *Scott*, or a business as in *Keta*, does not provide the need for a protective sweep. Therefore, when the court balances the need for the search versus the intrusion of privacy on the citizen, the scales will be weighted differently.

114. 39 N.Y.2d 122, 347 N.E.2d 575, 383 N.Y.S.2d 215 (1976).

115. *Id.* at 127, 347 N.E.2d at 579, 383 N.Y.S.2d at 219.

116. *Id.* In *Gonzalez*, the defendant was arrested on cocaine possession in the hallway outside of his apartment. *Id.* at 125, 347 N.E.2d at 578, 383

has been lawfully arrested, the police are not thereby free to conduct a full-blown, rummaging search of the arrested person's home without a warrant."[117]

In *People v. Belton*,[118] the court of appeals held that a warrantless search of a closed container visible in the passenger compartment of an automobile was permissible under the New York State Constitution, and was not improper because the search fell under the automobile exception to the general warrant requirement.[119] The court compared the Federal and New York State Constitutions, and stated that "[t]he identical wording of the two provisions does not proscribe our more strictly construing the State Constitution than the Supreme Court has construed the Federal Constitution."[120] Extending the principles of *Chimel*[121]

N.Y.S.2d at 217. After a struggle with drug enforcement agents, he yelled to his wife to lock the apartment door. *Id.* The officers then entered the apartment and conducted a search of all the closets for any other possible occupants. *Id.*

117. *Id.* (citing People v. Clements, 37 N.Y.2d 675, 678-79, 339 N.E.2d 170, 172, 376 N.Y.S.2d 480, 483 (1975); People v. Perel, 34 N.Y.2d 462, 468, 315 N.E.2d 452, 456, 358 N.Y.S.2d 383, 389 (1974); Chimel v. California, 395 U.S. 752, 764-65 (1969)).

118. 55 N.Y.2d 49, 52, 432 N.E.2d 745, 746, 447 N.Y.S.2d 873, 874 (1982). This case is the final disposition of the case New York v. Belton, 453 U.S. 454 (1981), which was heard by the United States Supreme Court and remanded to the New York Court of Appeals.

119. *Id.* A separate exception to the warrant requirement is recognized with respect to automobiles. *Id.* Its justification is based on "the reduced expectation of privacy associated with automobiles and the inherent mobility of such vehicles." *Id.* at 53, 432 N.E.2d at 747, 447 N.Y.S.2d at 875. In *Belton*, an officer searched through a jacket that was in the back seat of the car after the defendant had already been placed under arrest for possessing an envelope of marihuana, and found cocaine in a zippered pocket. *Id.* at 51, 432 N.E.2d at 746, 447 N.Y.S.2d at 874. The court concluded that incident to a lawful arrest, if the police "have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested or that a weapon may be discovered or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any containers found therein." *Id.* at 55, 432 N.E.2d at 748, 447 N.Y.S.2d at 876 (Cooke, J., delivered opinion of court).

120. *Id.* at 51, 432 N.E.2d at 745, 447 N.Y.S.2d at 873 (operative language of the fourth amendment and article I, § 12 of New York State Constitution is the same).

121. *See supra* notes 35-50 and accompanying text (discussing *Chimel*).

to the facts of this case, the court of appeals found that the Supreme Court, in *New York v. Belton*,[122] departed from the rationale in *Chimel* because the defendant's jacket was neither on his person nor within his reach.[123] The court concluded that "[o]nce the exception is employed to justify a warrantless search for objects outside an arrested person's reach it no longer has any distinct spatial boundary."[124]

The *Belton* concurrence differed from the majority in its views on the ramifications identical language of the New York State and Federal Constitutions has on search and seizure law.[125] Citing *People v. Ponder*,[126] the concurrence stated that "section 12 of article I of the New York Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both State and Federal courts."[127] The concurrence reasoned that there should not be two conflicting rules with respect to an officer's power to search incident to a lawful arrest and if the police officer adheres to the mandate of the Fourth Amendment to the Federal Constitution, his or her conduct should not be held to be invalid under the state constitution.[128]

The *Belton* dissent, however, pointed out that as the New York Court of Appeals has held before, "where the language of the two Constitutions is precisely the same, there need be no uniformity of interpretation."[129] The dissent reasoned that "so long

122. 453 U.S. 454 (1981); *see supra* notes 56-58.

123. *Belton*, 55 N.Y.2d at 53, 432 N.E.2d at 747, 447 N.Y.S.2d at 875. The defendant was outside the vehicle and his jacket was inside the vehicle with its pocket zippered. *Id.; see supra* note 45.

124. *Belton*, 55 N.Y.2d at 53, 432 N.E.2d at 747, 447 N.Y.S.2d at 875.

125. *Id.* at 57, 432 N.E.2d at 749, 447 N.Y.S.2d at 877 (Gabrielli, J., concurring).

126. 54 N.Y.2d 160, 429 N.E.2d 735, 445 N.Y.S.2d 57 (1981).

127. *Belton*, 55 N.Y.2d at 57, 432 N.E.2d at 749, 447 N.Y.S.2d at 877 (Gabrielli, J., concurring).

128. *Id.* at 58, 432 N.E.2d at 750, 447 N.Y.S.2d at 878 (Gabrielli, J., concurring).

129. *Id.* at 60, 432 N.E.2d at 751, 447 N.Y.S.2d at 779 (Fuchsberg, J., dissenting); *see also* People v. Isaacson, 44 N.Y.2d 511, 519-20, 378 N.E.2d

as freedom of the individual is thereby enlarged rather than diminished, recourse to State Constitutions for vindication of such regional right to differ [is] provided."[130] The dissent added that New York has not hesitated to avail itself of this principle of federalism.[131]

In *People v. Gokey*,[132] the court of appeals declined to interpret the New York State Constitution against unreasonable searches and seizures so narrowly.[133] In *Gokey*, the court held that a police officer's search of a defendant's duffel bag was improper.[134] The court stated that "[u]nder the State Constitution, an individual's right of privacy in his or her effects dictates that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances."[135]

However, in *People v. Smith*,[136] the court held that a warrantless search of a suspect's briefcase on a subway platform was not improper under the New York State Constitution.[137] The court

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78, 82, 406 N.Y.S.2d 714, 718 (1978).

130. *Belton*, 55 N.Y.2d at 60-61, 432 N.E.2d at 751, 447 N.Y.S.2d at 879 (Fuchsberg, J., dissenting). *See, e.g.*, People v. Isaacson, 44 N.Y.2d at 520, 378 N.E.2d at 82, 406 N.Y.S.2d at 718.

131. *Belton*, 55 N.Y.2d at 60-61, 432 N.E.2d at 751, 447 N.Y.S.2d at 879 (Fuchsberg, J., dissenting).

132. 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983). In this case, police officers responding to a tip, confronted the defendant upon his arrival at a bus terminal. *Id.* at 311, 457 N.E.2d at 724, 469 N.Y.S.2d at 619. When the police dogs indicated that there might be drugs in defendant's duffel bag, the police searched it and found marihuana. *Id.*

133. *Gokey*, 60 N.Y.2d at 312, 457 N.E.2d at 724, 469 N.Y.S.2d at 619.

134. *Id.* at 314, 457 N.E.2d at 725, 469 N.Y.S.2d at 620.

135. *Id.* at 312, 457 N.E.2d at 724, 469 N.Y.S.2d at 619. The court held that because the police did not fear for their safety and because they could not have reasonably believed that the search of the bag would preserve evidence that might be inside of it, the warrantless search of the bag was improper. *Id.* at 313-14, 457 N.E.2d at 725, 469 N.Y.S.2d at 620.

136. 59 N.Y.2d 454, 452 N.E.2d 1224, 465 N.Y.S.2d 896 (1983).

137. *Id.* at 455-56, 452 N.E.2d at 1225, 465 N.Y.S.2d at 897. The defendant was caught entering the New York City subway system through an exit gate, a "theft of services" crime. *Id.* at 456, 452 N.E.2d at 1225, 465 N.Y.S.2d at 897. The officer noticed that the defendant was wearing a bullet-proof vest and after the defendant denied that he was wearing one, the officers arrested him and seized the briefcase he was carrying. *Id.* at 456, 452 N.E.2d

stated that it did not subscribe to the defendant's argument that "the New York Constitution was violated because the briefcase was searched after he had been effectively neutralized and the briefcase was in the exclusive control of the police."[138] The court reasoned that "a search 'not significantly divorced in time or place from the arrest' may be conducted even though the arrested person has been subdued and his closed container is within the exclusive control of the police."[139]

The *Smith* court compared the federal and state constitutions, and stated that the Supreme Court had interpreted the United States Constitution as requiring "the drawing of a bright line for reasons of efficiency between permissible and impermissible searches."[140] The court further stated that "[w]e have interpreted the New York Constitution to require that the reasonableness of each search or seizure be determined on the basis of the facts and circumstances of the particular case."[141]

The *Smith* court noted that in cases regarding the warrantless search of closed containers, the New York State Constitution has been read more narrowly than its federal counterpart.[142] The court also stated, however, that a person's privacy interest in a closed container "may become subordinate to the need of the People, under exigent circumstances, to search it for weapons or evidence . . . ."[143]

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at 1226, 465 N.Y.S.2d at 898. The court noted that while the crime the defendant had just committed was "not one suggestive of the presence of a weapon, the fact that he was wearing a bullet-proof vest was, and was further enhanced by his denial of the fact." *Id.* at 459, 452 N.E.2d at 1227, 465 N.Y.S.2d at 899. Inside the briefcase the officers found a gun. *Id.* at 456, 452 N.E.2d at 1226, 465 N.Y.S.2d at 898. The defendant was charged with illegal possession of the gun, and moved to have the evidence suppressed. *Id.*

138. *Id.* at 457, 452 N.E.2d at 1226, 465 N.Y.S.2d at 898.

139. *Id.* at 458, 452 N.E.2d at 1227, 465 N.Y.S.2d at 899 (quoting People v. DeSantis, 46 N.Y.2d 82, 88, 385 N.E.2d 577, 580, 412 N.Y.S2d 838, 841 (1978)).

140. *Id.* The court applies this bright line rule even though the result is to occasionally permit an unreasonable search or forbid a reasonable one. *Id.*

141. *Id.* at 457, 452 N.E.2d at 1226-27, 465 N.Y.S.2d at 898-99.

142. *Id.* at 458, 452 N.E.2d at 1227, 465 N.Y.S.2d at 899.

143. *Id.*

The *Smith* concurrence remarked that holding a police officer to a different standard under the New York State Constitution than he or she is held under the Federal Constitution creates confusion, and thus, "'a person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.'"[144] This is a major problem that confronts us with respect to the constitutionality of protective sweeps under the New York State Constitution. Until the New York Court of Appeals rules on this issue, citizens of New York may not know the level of their constitutional protection and law enforcement officers may not know the boundaries of their authority.

In *People v. Blasich*,[145] the court of appeals noted that "the search-incident-to-arrest-exception to the warrant and probable cause requirements of the [New York] State Constitution exists only to protect against the danger that an arrestee may gain access to a weapon or may be able to destroy or conceal critical evidence."[146] In *Blasich*, a police officer approached the defendant's vehicle in an airport parking lot because the defendant failed to pay the parking lot fee.[147] Upon reaching the car, the officer observed several tools, commonly used to break into cars, on the floor of the passenger compartment.[148] The court found that the tools admitted into evidence would not be suppressed because they were obtained within the scope of a search incident to a lawful arrest under the state constitution.[149] The court stated that "such a search must be limited to the arrestee's person and the area from within which he might gain possession of a weapon or destructible evidence."[150]

One month after *Blasich*, the court decided *People v.*

144. *Id.* at 460, 452 N.E.2d at 1228, 465 N.Y.S.2d at 900 (Jasen, J., concurring) (quoting People v. Belton, 55 N.Y.2d 49, 57, 432 N.E.2d 745, 749, 447 N.Y.S.2d 873, 877 (1982)).

145. 73 N.Y.2d 673, 541 N.E.2d 40, 543 N.Y.S.2d 40 (1989).

146. *Id.* at 678, 541 N.E.2d at 43, 543 N.Y.S.2d at 43.

147. *Id.* at 676, 541 N.E.2d at 42, 543 N.Y.S.2d at 42.

148. *Id.*

149. *Id.* at 677-78, 541 N.E.2d at 43, 543 N.Y.S.2d at 43.

150. *Id.* at 678, 541 N.E.2d at 43, 543 N.Y.S.2d at 43.

Torres.[151] In *Torres*, the court of appeals held that "despite the [United States] Supreme Court's approval" of warrantless searches of passenger compartments in a suspect's vehicle in *Michigan v. Long*,[152] New York's more protective constitutional provision prohibits such searches and deems them violative of individuals' rights.[153] In *Torres*, a police officer reached into a suspect's car and took a shoulder bag from the front seat.[154] While the suspect was being frisked outside the car, the officer felt the bag and opened it.[155] A gun was discovered and subsequently entered into evidence.[156] The court found "the actions of the detectives [would] be justified only if the expansive . . . *Terry v. Ohio* [157] 'stop and frisk' procedure that was adopted by *Michigan v. Long*[158] was determined to be consistent with the privacy rights guaranteed by the New York State Constitution."[159] The court, however, concluded that it was not.[160] The court has shown a willingness to employ, under the state constitution, a more protective standard in order to establish predictability and precision for judicial review of search and seizure issues and protection of citizens' rights.[161] The court of appeals expressed its dissatisfaction[162] with the Supreme Court's position in *New York v. Belton*, [163] that under the Fourth Amendment a warrantless search of a closed container in an automobile was permissible as a search incident to a lawful

151. 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989).

152. 463 U.S. 1032 (1983); *see supra* notes 64-70 and accompanying text.

153. *Torres*, 74 N.Y.2d at 226, 543 N.E.2d at 62, 544 N.Y.S.2d at 797.

154. *Id.*

155. *Id.*

156. *Id.*

157. 392 U.S. 1 (1968).

158. 463 U.S. 1032 (1983).

159. *Torres*, 74 N.Y.2d at 227, 543 N.E.2d at 63, 544 N.Y.S.2d at 798.

160. *Id.* at 228, 543 N.E.2d at 63, 544 N.Y.S.2d at 798.

161. *Id.*; *see also* People v. P.J. Video, 68 N.Y.2d 296, 304, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912 (1986); People v. Johnson, 66 N.Y.2d 398, 407, 488 N.E.2d 439, 445, 497 N.Y.S.2d 618, 624 (1985).

162. *Torres*, 74 N.Y.2d at 229, 543 N.E.2d at 64, 544 N.Y.S.2d at 799.

163. 453 U.S. 454 (1981).

arrest.[164] Commenting on the Supreme Court's drastic departure from *Chimel v. California*[165] in *New York v. Belton*,[166] the court of appeals stated that "'search and seizure law [becomes] uncontrollable when the rubric [is] adopted and the rationale discarded.'"[167]

The *Torres* court condemned the conduct of the officers as not being "reasonably related to the need to protect the officer's safety,"[168] due to the fact that the suspect was no longer within reach of the vehicle.[169] The court further concluded that the officers' actions were improper under the New York State Constitution, and that the resulting evidence should have been suppressed.[170]

The *Torres* dissent, in advocating uniformity between the state and federal constitutions, cited public policy as support for its position.[171] The dissent explained that the New York police were in as much danger, if not more, than other police departments throughout the United States.[172] Therefore, "there [wa]s no justification for bestowing a different and more onerous, and far more dangerous rule of reason, operative only . . . under our State Constitution."[173]

In a recent New York Court of Appeals decision, *People v. Dunn*,[174] the court lent further support for its strict construction of the state constitution with regard to searches and seizures.[175]

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164. *Id.* at 462.

165. 395 U.S. 752 (1968).

166. 453 U.S. 454 (1981).

167. *Torres*, 74 N.Y.2d at 229, 543 N.E.2d at 64, 544 N.Y.S.2d at 799 (alteration in original) (quoting People v. Brosnan, 32 N.Y.2d 254, 267, 298 N.E.2d 78, 86, 344 N.Y.S.2d 900, 911 (1973)).

168. *Id.* at 231, 543 N.E.2d at 65-66, 544 N.Y.S.2d at 801.

169. *Id.* at 230, 543 N.E.2d at 65, 544 N.Y.S.2d at 800.

170. *Id.* at 231, 543 N.E.2d at 66, 544 N.Y.S.2d at 801.

171. *Id.* at 234, 543 N.E.2d at 68, 544 N.Y.S.2d at 803 (Bellacosa, J., dissenting).

172. *Id.* (Bellacosa, J., dissenting).

173. *Id.* (Bellacosa, J., dissenting).

174. 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 111 S. Ct. 2830 (1991).

175. *Id.* at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

The court noted that in past years it "has not hesitated to interpret article I, § 12 independently of its Federal counterpart when the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions."[176] The court concluded that we should not lose sight of the fact that "[t]he State Constitution protects the privacy interests of the people of our State . . . against the *unfettered discretion* of government officials to search or seize."[177]

B. Appellate Division Cases

Thus far, the analysis has focused on New York Court of Appeals case law that has dealt with searches incident to a lawful arrest, due to the fact that the court has yet to address the protective sweep issue. An examination of the New York Supreme Court, Appellate Division decisions that discussed protective sweeps incident to a lawful arrest is necessary because this analysis may shed some light on how the New York Court of Appeals will rule on this issue.

In *People v. Ocasio*,[178] the appellate division, fourth department adopted the trial court's[179] holding that when the police received reliable information that stolen guns were stored on the premises, they were entitled to make a protective sweep through-

176. *Id.* In *Dunn*, the use of a "canine sniff" was not deemed to be a search within the meaning of the Fourth Amendment and thus, was not improper under the Federal Constitution. *Id.* at 23, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390. However, the court of appeals found that it was a search under the state constitution, but was not violative of the state constitutional mandate because the officers had reasonable suspicion to conduct the sniff search. *Id.* at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392. The court's construction of the state constitution "requires that the police have at least a reasonable suspicion that a residence contains illicit contraband before . . . [a canine sniff] may be employed." *Id.* at 21, 564 N.E.2d at 1055, 563 N.Y.S.2d at 389.

177. *Id.* at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

178. 120 A.D.2d 932, 502 N.Y.S.2d 960 (4th Dep't 1986).

179. 106 Misc. 2d 138, 430 N.Y.S.2d 971 (Sup. Ct. Monroe County 1980). The appellate division noted that the judgment of the trial court was affirmed for reasons stated in the trial court's opinion. Therefore, this Comment works solely from the trial court's decision.

out the building.[180] The court stated that this enabled the police to ensure that there were no guns available to anyone not in custody and that there were no other persons present who could pose a threat to the their safety.[181]

In *Ocasio,* stolen guns were reported to be located in the defendant's house, and when the police arrived they were instructed, upon the lawful arrest of the defendant, to sweep the building for the weapons.[182] In justifying the constitutionality of the search, the trial court, on federal grounds,[183] reasoned that the police officers could have reasonably concluded that their lives were endangered due to the presence of weapons.[184] The court stated that the United States Supreme Court's holding in *Chimel v. California* [185] "should not be construed as absolutely prohibiting searches beyond the area of the arrestee's reach."[186] The court stated that "the officer's have a right to assure their safety and they may look elsewhere on the premises to guard against the chance that third parties may offer resistance."[187] It seems that as early as 1980, the lower courts in New York were willing to support protective sweeps or searches as constitutional.[188]

In *People v. Febus,*[189] the court noted that several United States Court of Appeals for the Second Circuit decisions took the

180. *Id.* at 143, 430 N.Y.S.2d at 976.

181. *Id.*

182. *Id.* at 139, 430 N.Y.S.2d at 973.

183. *Ocasio,* was decided solely on federal grounds because the defendant did not raise a state constitutional claim.

184. *Ocasio,* 106 Misc. 2d at 142, 430 N.Y.S.2d at 975.

185. 395 U.S. 752 (1969). *See supra* notes 27-52 and accompanying text (discussing *Chimel).*

186. *Ocasio,* 106 Misc. 2d at 143, 430 N.Y.S.2d at 976.

187. *Id.* at 143-44, 430 N.Y.S.2d at 976. When the trial court heard this case in 1980, *Chimel* was the principal authority at the federal level on searches incident to lawful arrests.

188. In 1986, the appellate division, fourth department affirmed the trial court's judgment in *Ocasio* and adopted its reasoning. *See* 120 A.D.2d 932, 502 N.Y.S.2d 960 (4th Dep't 1986).

189. 157 A.D.2d 380, 556 N.Y.S.2d 1000 (1st Dep't), *appeal granted,* 76 N.Y.2d 898, 562 N.E.2d 885, 561 N.Y.S.2d 560 (1990), *appeal denied,* 77 N.Y.2d 835, 568 N.E.2d 652, 567 N.Y.S.2d 203 (1991).

position, "that when police officers have lawfully entered the premises to effect an arrest, they are entitled to make a quick and limited pass through the premises to check for third persons who may . . . pose a threat to [their safety]."[190] The facts in *Febus* illustrate the New York appellate division's willingness to allow intrusive protective sweeps under New York law.[191] Police officers responded to a radio call that four men were seen with guns entering a certain building.[192] When the police reached the third floor in their attempt to find the men, they encountered a minor child who was seen leaving an apartment holding several pouches of white powder and some money.[193] Shortly thereafter, the police pushed open the defendant's apartment door and searched the premises for guns.[194] The court relied on the officers' argument that they were "[f]earful that 'there was a gun on the other side [of the door] to shoot' [them] . . . ."[195] Although it was never ascertained whether the men identified in the radio call were the men in the apartment, the defendant was arrested and the evidence seized in the sweep was admitted.[196]

Rationalizing the protective sweep of the defendant's apartment, the appellate division stated that "[a] police officer . . . cannot and should not close his eyes to reality and does not have to 'await the glint of steel' before acting to protect himself or others."[197] The court concluded that the intrusion in this case

190. *Febus*, 157 A.D.2d at 382, 556 N.Y.S.2d at 1001.

191. The court did not specifically discuss the validity of protective sweeps under the New York State Constitution because it recognized the "dearth of case law directly on point in our State courts." *Id.* Therefore, the court relied on federal authority to justify the sweep of the defendant's apartment. It is my opinion that the lack of an analysis under the state constitution is one of the reasons why this case was denied review by the New York Court of Appeals. *See supra* note 189.

192. *Febus*, 157 A.D.2d at 381, 556 N.Y.S.2d at 1000.

193. *Id.*

194. *Id.*

195. *Id.* at 384, 556 N.Y.S.2d at 1002.

196. *Id.* at 385, 556 N.Y.S.2d at 1003 (Milonas, J., dissenting).

197. *Id.* at 384, 556 N.Y.S.2d at 1002 (quoting People v. Benjamin, 51 N.Y.2d 267, 271, 414 N.E.2d 645, 648, 434 N.Y.S.2d 144, 146 (1980)).

was "minimal"[198] compared to that in *Maryland v. Buie* [199] and that "the officer's pushing open of the apartment door was reasonable in the context of a protective sweep and within the meaning of the Fourth Amendment," as was *Buie's* more intrusive sweep.[200] The appellate division in *Febus* did not afford the defendant more rights under the New York State Constitution even though it had the power to do so.[201] Rather, it permitted the protective sweep, applying the Fourth Amendment and its interpretation by the *Buie* court.[202]

Most recently in *People v. Rivera*,[203] the appellate division, fourth department held that police officers were reasonably prudent in believing that based on articulable facts "the attic of defendant's home might harbor an individual posing a danger to those on the scene,"[204] and that a limited protective sweep of that area in conjunction to a lawful arrest was proper.[205] Once again, it appears the New York Appellate Division is not affording New York citizens more rights under article I, section 12 of the New York State Constitution.[206]

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198. *Id.* Classifying the sweep as one less intrusive than the sweep in *Buie*, the *Febus* court indicated that the sweep is certainly constitutional under the fourth amendment because it fits within *Buie's* broader holding. *Id.* at 385, 556 N.Y.S.2d at 1002.

199. 494 U.S. 325 (1990); *see supra* notes 72-90 and accompanying text (discussing *Buie* standard permitting protective sweeps).

200. *Febus*, 157 A.D.2d at 385, 556 N.Y.S.2d at 1003.

201. *See id.*

202. *Id.* at 385, 556 N.Y.S.2d at 1002-03. In *Buie*, the United States Supreme Court found that the officers could "'look in closets and in other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.'" *Id.* (quoting *Buie*, 494 U.S. at 334). The appellate division added that "[c]learly, the slightly ajar door [in *Febus*] . . . fell within this definition." *Id.* at 385, 556 N.Y.S.2d at 1003.

203. 172 A.D.2d 1059, 569 N.Y.S.2d 316 (4th Dep't 1991).

204. *Id.*

205. *Id.*

206. *See supra* note 16 (New York State Constitution version of the fourth amendment).

C. Protective Sweeps in Other Jurisdictions after Buie

A comment discussing the constitutionality of protective sweeps would not be complete without some review of how other state's have treated the issue after the *Buie* decision. In *State v. Murdock,*[207] the Supreme Court of Wisconsin held that a search of the defendant's pantry room drawer was proper and that the evidence seized would not be excluded.[208] The court reasoned that the texts of the Fourth Amendment and article I, section 11 of the Wisconsin Constitution[209] were "essentially identical,"[210] and that the court "'has consistently and routinely conformed the law of search and seizure under the state constitution to that developed by the United States Supreme Court under the fourth amendment.'"[211] This is an example of a state judiciary adopting a policy of uniformity between the two nearly identical sections. However, the New York Court of Appeals has not yet set a firm policy on the matter.[212] The Wisconsin Supreme Court relied on the *Chimel* rule [213] to justify the search of the pantry drawer for

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207. 455 N.W.2d 618 (Wis. 1990).

208. *See Murdock,* 455 N.W.2d at 626-27. A rifle was found in a pantry drawer. *Id.* at 622. *See supra* note 17 (discussing the exclusionary rule).

209. WIS. CONST. art. I, § 11 provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but on probable cause, supported by oath of affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Id.

210. *Id.*at 622.

211. *Id.* (quoting State v. Fry, 388 N.W.2d 565, 575, *cert. denied,* 479 U.S. 989 (Wis. 1986)).

212. *See* People v. Belton, 55 N.Y.2d 49, 52, 432 N.E.2d 745, 746, 447 N.Y.S.2d 873, 874 (1982) (the Supreme Court upheld a police officer's search of defendant's zippered jacket pocket inside the passenger compartment of a car, after a lawful arrest, while the arrestees were standing outside the car, as a search incident to a lawful arrest, and the court of appeals upheld under the automobile exception to the warrant requirement). *See supra* notes 118-31 and accompanying text (discussing interpretation of identical language between the fourth amendment and article 1, § 12 of the New York State Constitution).

213. Chimel v. California, 395 U.S. 752 (1969). The rule permits searches of the area within the defendant's reach where the defendant might gain

weapons.[214] Although a person could not hide in a drawer, and thus, the search was not a protective sweep, the court recognized *Buie* as "affirming the efficacy of the *Chimel* rule."[215]

In *Hayes v. State*,[216] the Nevada Supreme Court held that a protective sweep was not justified because police officers did not have "sufficient grounds to fear for their safety."[217] The court stated that the "sole purpose [of a protective sweep] is to protect police officers during the course of an arrest from potentially dangerous persons other than the arrestee who are believed to be on the premises."[218] The court concluded that the standard stated by the majority in *Buie* was a reasonable one.[219] Moreover, the court proclaimed that "[w]e are bound to follow the constitutional interpretations of the United States Supreme Court, and we further adopt it as the standard to be applied in the State of Nevada."[220]

In *Smith v. State*,[221] the Supreme Court of Indiana held that a protective sweep of a locked storage room adjacent to the room where the arrest occurred was not justified and did not fall within the protective sweep exception for warrantless searches.[222] The

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immediate control of a weapon. *Id.* at 763. *See supra* note 45 and accompanying text.

214. *Murdock*, 455 N.W.2d at 623.

215. *Id.*

216. 797 P.2d 962 (Nev. 1990).

217. *Id.* at 965. Article I, § 18 of the Nevada Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but upon probable cause, supported by Oath of Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized.

NEV. CONST. art. I, § 18.

218. *Id.* In *Hayes*, officers discovered drugs and records of drug sales while executing a protective sweep of the defendant's mobile home upon lawful arrest of the defendant. *Id.* at 964.

219. *Id.* at 966.

220. *Id.*

221. 565 N.E.2d 1059 (Ind. 1991).

222. *Id.* at 1063. Article I, § 11 of the Indiana Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure shall not be

court adopted the *Buie* standard that the arresting officers must reasonably believe that the area to be swept harbors an individual posing a danger to those on the arrest scene.[223] The court explained that the officers' reasons for searching the locked room did not constitute *Buie's* requirement of "specific and articulable facts"[224] because they only had a "hunch" that someone could possibly be hiding in the room.[225]

The cases discussed above exemplify a state court's ability to adopt only the base level protection of the Fourth Amendment in the area of protective sweeps as interpreted by *Buie*. It should be noted, however, that even though the states have adopted the same standard, they may apply it differently. Although these cases have no binding effect on the New York Court of Appeals, they may be viewed as persuasive authority for finding protective sweeps constitutional under New York law.

CONCLUSION

Under current federal law, a "protective sweep" incident to a lawful arrest is constitutional, provided the searching police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the area swept, harbors an individual posing a danger to the officer or others.

The New York Court of Appeals is faced with the tough question of deciding whether or not it will choose to expand upon the rights afforded to its citizens by the Fourth Amendment and declare protective sweeps unconstitutional. If the court chooses not to expand upon the Fourth Amendment, then it will signify the

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violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

IND. CONST. art. I, § 11.

223. *Id.* at 1062.

224. *Id.* at 1063. *See supra* notes 74-92 and accompanying text (discussing *Buie's* "specific and articulable facts" requirement).

225. *Smith*, 565 N.E.2d at 1063.

court's approval of the *Buie* standard and its requirements. I believe this is the direction that the New York Court of Appeals will travel when it faces the issue of the constitutionality of protective sweeps. As to this date however, the court has not addressed the issue.[226] In a state such as New York, which has an enormously high amount of crime,[227] I believe the judiciary should clarify the search and seizure law in the important area of protective sweeps.

Steven M. Fox

226. The court of appeals granted appeal to People v. Febus and then retracted and denied appeal a few months later. People v. Febus, 157 A.D.2d 380, 556 N.Y.S.2d 1000 (1st Dep't), *appeal granted*, 76 N.Y.2d 898, 562 N.E.2d 885, 561 N.Y.S.2d 560 (1990), *appeal denied*, 77 N.Y.2d 835, 568 N.E.2d 652, 567 N.Y.S.2d 203 (1991).

227. *See, e.g.*, Allen R. Gold, *Businesses Offer Aid to Dinkins to Combat Crime*, N.Y. TIMES, Sept. 18, 1990, at B4.